No. COA20-775

NORTH CAROLINA COURT OF APPEALS

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, DISABILITY RIGHTS NORTH CAROLINA, AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA LEGAL FOUNDATION, KIM T. CALDWELL, JOHN E. STURDIVANT, SANDARA KAY DOWELL, and CHRISTINA RHODES, Plaintiff-Appellees, v. ROY COOPER, in his official capacity as Governor of North Carolina, ERIK A. HOOKS, in his official capacity as Secretary of the North Carolina Department of Public Safety, and BILL FOWLER, ERIC MONTGOMERY, ANGELA BRYANT, and GRAHAM ATKINSON, in their official capacities as Post-Release Supervision and Parole Commissioners, Defendant-Appellants.	From Wake County

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PLAINTIFF-APPELLEES' MOTION TO DISMISS APPEAL

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Pursuant to Rule 37 of the North Carolina Rules of Appellate Procedure, Plaintiffs move the Court to dismiss this interlocutory appeal of the trial court's preliminary injunction and related orders. Defendants have not established that the trial court's orders affect a substantial right and that any such right will be lost without immediate review. This Court therefore lacks jurisdiction and the appeal is "subject to being dismissed." *Dixon v. Dixon*, 62 N.C. App. 744, 744, 303 S.E.2d 606, 607 (1983).

BACKGROUND

This case concerns Defendants' response to the COVID-19 pandemic in state prisons. Plaintiffs—current and formerly incarcerated people, their family, and organizations dedicated to civil rights advocacy—allege that incarcerated people in state prisons are exposed to a substantial risk of serious harm and death from COVID-19, in violation of the ban on cruel or unusual punishment in Article I, Section 27 of the state Constitution. (R. pp. 15–21.) Specifically, Plaintiffs allege that state prisons lack the staffing and infrastructure necessary to mitigate the risk of harm, and that Defendants have failed to reduce the prison population to allow for adequate social distancing and protection of the most vulnerable. (R. pp. 28–37.)

On 16 June 2020, the trial court issued a preliminary injunction finding that Plaintiffs were likely to succeed on the merits and suffer irreparable

harm, and that the balance of equities favored an injunction. The trial court ordered Defendants to:

- Reopen the application process for organizations to serve as reentry partners. The trial court authorized, but did not require, Defendants to expand consideration for early releases.
- Conduct universal testing of the state prison population.
- Cease inter-prison transfers without the testing or quarantining of the transferee. The court made exceptions for transfers made for medical or imminent safety reasons.
- Ensure that quarantine and isolation living conditions did not amount to punitive solitary confinement.
- Produce information to the court concerning prison living conditions, prisons' pandemic response measures, and disparities in prevention measures among individual prisons.

(R. pp. 1532–37.)

On 10 July 2020, the trial court revised its preliminary injunction to remove some of the reporting requirements Defendants argued were too burdensome. (R. p. 1660.) The court also ordered Defendants to ensure that people in medical isolation could effectively communicate distress to staff and live in well-ventilated and temperature-regulated cells; that quarantine cells

must have solid doors and walls; and if Defendants could not meet these criteria, send people in quarantine to a medical facility. (R. p. 1660.) The trial court also ordered surveillance testing (ongoing monthly testing of representative samples of each housing unit in Defendants' prisons), ordered Defendants to produce relevant information, and imposed weekly reporting requirements. (R. pp. 1660–1662.)

Defendants filed notice of appeal on 16 July 2020. They did not seek a stay or expedited review of the trial court's orders. (Def. Br. p. 5.)

ARGUMENT

I. THE TRIAL COURT'S ORDERS GRANTING PRELIMINARY, TEMPORARY, AND LIMITED RELIEF DO NOT AFFECT A SUBSTANTIAL RIGHT THAT WILL BE LOST WITHOUT IMMEDIATE REVIEW.

This Court lacks jurisdiction over a trial court's interlocutory orders unless they "(1) affect a substantial right and (2) work injury if not corrected before final judgment." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 728, 392 S.E.2d 735, 737 (1990). A substantial right is "a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a man is entitled to have preserved and protected by law[.]" *Oestreicher v. Am. Nat. Stores, Inc.*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976) (quotation marks omitted).

Issuance of a preliminary injunction alone does not authorize immediate review—"[t]he mere fact that a defendant has been enjoined does not constitute such an injury." *Gilbert v. N. Carolina State Bar*, 363 N.C. 70, 77, 678 S.E.2d 602, 606 (2009). The appellant must still carry the burden of satisfying both prongs of the substantial rights test. *Id.*

Here, Defendants cannot satisfy either, and the appeal should be dismissed.

A. Defendants do not have a substantial right to completely unfettered policymaking authority.

Defendants argue that, because the trial court's orders "affect and constrain Defendants' ability to exercise their constitutional and statutory rights and duties and to apply executive policymaking discretion during an emergency, the decisions affect a substantial right." (Def. Br. p. 25.) This argument fails because the trial court ordered narrow, temporary public health precautions, leaving Defendants' vast authority to make policy for state prisons—including the issues addressed by the trial court—mostly untouched.

Although an interlocutory order may affect a substantial right if it completely prevents execution of a function that is critical to a government or business entity, that is not the case where the order's scope is far more limited. For example, in *Gilbert,* cited by Defendants, the trial court

permanently enjoined the State Bar from bringing disciplinary action against an attorney. 363 N.C. at 74, 678 S.E.2d at 605. The Supreme Court held that the order affected a substantial right because it "forever prohibits [the Bar] from prosecuting [the case]," which affected core duties "undertaken pursuant to statute for the benefit of both the legal profession and the citizens of North Carolina." *Id.* at 76–77, 678 S.E.2d at 606. Critically, the trial court order did not merely place *some* limitation on the Bar's ability to discipline the attorney—one of the main reasons the Bar exists in the first place—but completely prevented the Bar from doing so. *See id.*

Similarly, in *Cablevision of Winston-Salem, Inc. v. Winston-Salem*, also cited by Defendants, the trial court enjoined a city from voting on or enforcing certain ordinances concerning the award of cable franchises. 3 N.C. App. 252, 254, 164 S.E.2d 737, 738 (1968). This Court took up the appeal because the city could not exercise "its legislative function in dealing with a matter of large public interest to [its] citizens . . . ." *Id.* at 258, 164 S.E.2d 740. As in *Gilbert,* the city was entirely prevented from exercising a basic governmental power. *See also Redlee/SCS, Inc. v. Pieper*, 153 N.C. App. 421, 423, 571 S.E.2d 8, 11 (2002) (taking immediate review of preliminary injunction that completely prohibited a person from pursuing his career anywhere in Mecklenburg County).

By contrast, in *Bessemer City Express, Inc. v. City of Kings Mountain*, a local ordinance prevented businesses from operating videogame equipment. 155 N.C. App. 637, 640, 573 S.E.2d 712, 714 (2002). This Court held that the ordinance (and the trial court's denial of preliminary relief) did not affect a substantial right because it "does not restrict plaintiffs from operating their businesses' other functions such as selling food and supplies. Plaintiffs simply are limited in their use of video machines." *Id.* at 640, 573 S.E.2d at 714 (citations omitted). *See also City of Fayetteville v. E & J Investments, Inc.*, 90 N.C. App. 268, 269, 368 S.E.2d 20, 21 (1988) (finding interlocutory review not warranted where preliminary injunction enjoined topless dancing, but not other aspects of business operation).

Here, the trial court ordered Defendants to expand COVID-19 testing, the most onerous part of which—universal baseline testing—finished up months ago and is thus not part of this appeal. (R. p. 1645.) The trial court also ordered Defendants to conduct surveillance testing; refrain from conducting transfers without testing or quarantining the transferee; refrain from imposing quarantine that amounted to punitive solitary confinement; and provide the court with information about their pandemic response. (R. pp. 1660–1662.) The trial court authorized, but did not order, Defendants to expand their criteria for extended limits of confinement (ELC) eligibility, nor did the trial court order anyone's release. (R. pp. 1532–1533.)

These modest, common-sense public health precautions do not significantly limit Defendants' *enormous* authority to make policy in response to the pandemic or any other issue. Over Plaintiffs' objections, Defendants continue to have complete discretion to release or not release people through ELC, parole, clemency, commutation, or pardon.[1] (R. pp. 1531–1532.) They also continue to transfer whoever they want, wherever they want, for virtually any reason, subject only to the requirements of testing or quarantine—and even those requirements have safety and medical exceptions. (R. pp. 1534–1535.) Defendants may still house, clothe, and feed people as they like, subject only to minimum constitutional requirements. In sum, the trial court's orders did not change the fact that prison is a unique environment where the State has near complete authority over how people live.[2]

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[1] It is well established that courts have authority to order release when necessary to remedy unconstitutional conditions of confinement. *See, e.g.*, *Brown v. Plata*, 563 U.S. 493 (2011) (affirming order that would release up to 46,000 prisoners to remedy unconstitutional overcrowding); *In re Von Staich*, 56 Cal. App. 5th 53, 270 Cal. Rptr. 3d 128 (2020) (ordering fifty percent reduction in population of San Quentin prison to remedy COVID-19 exposure). Such an order would have been appropriate here.

[2] Indeed, the North Carolina Administrative Procedure Act exempts Defendants from any cumbersome rulemaking requirements when it comes to prisoners, probationers, and parolees. N.C.G.S. § 150B-1(d)(6).

Moreover, even though Defendants' executive policymaking discretion is vast, it is not absolute. Despite their suggestions to the contrary, Defendants do not have a right to create and maintain conditions in state prisons with no oversight from the courts—a coequal branch of government with an affirmative obligation to protect the rights of people in state custody. As the United States Supreme Court observed in a case addressing California's prison overcrowding crisis—which, like this case, also involved the spread of infectious disease—courts "must not shrink from their obligation to enforce the constitutional rights of all persons, including prisoners. Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration." *Brown v. Plata*, 563 U.S. 493, 511 (2011) (affirming expansive statewide injunction).

This principle underscores the fallacy of Defendants' sweeping argument that they have a right to operate state prisons without even minimal oversight from the judiciary. If that were true, the State could appeal virtually any time a court granted preliminary relief ordering executive branch officials to do or not do something, potentially flooding the appellate courts with piecemeal litigation—precisely what the substantial rights test is supposed to prevent. *See Veazey v. City of Durham*, 231 N.C. 357, 363, 57 S.E.2d 377, 382 (1950) ("There is no more effective way to

procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders.").

B. Any substantial right affected by the trial court's orders will not be lost without immediate review.

Even assuming that a substantial right is at issue, for this Court to have jurisdiction "the enforcement of the substantial right must be lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order." *J & B Slurry Seal Co. v. Mid-S. Aviation, Inc.*, 88 N.C. App. 1, 6, 362 S.E.2d 812, 815 (1987). Defendants argue that their "ability to exercise their policymaking judgment to address the pandemic will be critically impaired—and, given the evolving nature of the pandemic, perhaps lost forever—if not raised and addressed now." (Def. Br. p. 25.) Again, the limited, temporary nature of the trial court's orders—as well as Defendants' lack of urgency in pursuing this appeal—demonstrate otherwise.

First, Defendants say nothing about what they would like to do but cannot because of the trial court's orders. Perhaps Defendants would prefer to not expend resources testing and quarantining people transferred between prisons. Or perhaps they want to avoid the administrative inconvenience of providing weekly reports to the court on testing and transfers (although

much of this information would be publicly available anyway[3]). But it is difficult to understand how these limited, common-sense measures "critically impair" Defendants' vast policymaking authority, and Defendants offer no explanation as to why. Moreover, assuming that a substantial right is implicated, it cannot be "lost forever" under this preliminary injunction, which by its very nature "is temporary and lasts no longer than the pendency of the action." *State v. Fayetteville St. Christian Sch.*, 299 N.C. 351, 357–58, 261 S.E.2d 908, 913 (1980).

Second, Defendants' lack of urgency in pursuing this appeal undercuts their dire warnings of imminent injury. If a party believes a lower court decision will cause serious harm while appeal is pending, they may seek a stay. *See* N.C. R. App. P. 8(a). Here, however, Defendants chose not to move for a stay or ask this Court for expedited review. Nor have they attempted to dissolve the preliminary injunction by showing the trial court that any constitutional violation has been remedied. At this point, Defendants have already been living with the preliminary injunction for over five months; by the time this appeal is resolved, likely several months from now, the parties will be in the thick of summary judgment or trial, after which Defendants

[3] *See* North Carolina Department of Public Safety, Prisons Info on COVID-19, https://www.ncdps.gov/our-organization/adult-correction/prisons/prisons-info-covid-19.

will have a right to appeal any final judgment. Defendants cannot credibly argue that they will suffer serious injury before then.

CONCLUSION

Defendants have failed to establish that the trial court's orders implicate a substantial right and that any such right would be lost or prejudiced without immediate review. This Court should thus dismiss the appeal for lack of jurisdiction. Plaintiffs further respectfully ask the Court to decide this motion as soon as practicable in the interest of judicial economy and so the parties may avoid the additional expenditure of time and resources briefing the merits of an improperly filed appeal.

This 25th day of November, 2020.

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